CORNELIA MUSLIE & ANOR v. KETUA PENGARAH PENDAFTARAN NEGARA, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[ORIGINATING SUMMONS NO: WA-24-41-08-2020]
18 OCTOBER 2022

Abstract – *(i) Adoption of a child, whether born legitimate or illegitimate, does not operate retrospectively to acquire citizenship by operation of law under art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of the Federal Constitution. The sole determinant to acquire citizenship by operation of law is the citizenship of either biological parent, obtained at the time of the child's birth. Adoption, and for that matter, citizenship of the adoptive parents, is immaterial and irrelevant; and (ii) An adopted child who is illegitimate at the time of birth, but whose lineage could be traceable to his/her biological mother, could not be said to be as one 'who is not born a citizen of any country' because at the time of his/her birth, he/she acquired the citizenship of the biological mother.*

CHILDREN AND YOUNG PERSONS: *Adoption – Citizenship – Whether adopted child should be registered as citizen of Malaysia – Acquisition of citizenship by operation of law – Article 14(1)(b) read together with Part II of Second Schedule of Federal Constitution ('FC') – Whether origin of paternal and maternal side of child must be ascertained – Whether child must be born in Federation to biological parents one of whom, at time of birth, either citizen or permanently resident in Federation – Whether adoptive parents included in art. 14(1)(b) of FC by Parliament – Whether adoption order has implication on citizenship of adopted child – Whether adoption of child, whether born legitimate or illegitimate, operates retrospectively to acquire citizenship by operation of law under art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of FC – Births and Deaths Registration Act 1957, s. 13*

CHILDREN AND YOUNG PERSONS: *Adoption – Citizenship – Whether adopted child should be registered as citizen of Malaysia – Whether adopted child 'not born a citizen of any country' at time of birth – Whether adopted child's lineage traceable to biological mother – Whether adopted child acquired citizenship of biological mother – Whether adopted child Malaysian citizen by operation of law under art. 14(1)(b) read together with s. 1(e), Part II, Second Schedule of Federal Constitution ('FC') and s. 17, Part III Second Schedule of FC – Births and Deaths Registration Act 1957, s. 13*

A ***CONSTITUTIONAL LAW:*** *Citizenship – Operation of law, by – Adoption of child – Birth certificate issued as 'non-citizen' – Whether adopted child should be registered as citizen of Malaysia – Acquisition of citizenship by operation of law – Article 14(1)(b) read together with Part II of Second Schedule of Federal Constitution – Whether origin of paternal and maternal side of child must be*
B *ascertained – Whether child must be born in Federation to biological parents one of whom, at time of birth, either citizen or permanently resident in Federation – Whether adoptive parents included in art. 14(1)(b) of FC by Parliament – Whether adoption order has implication on citizenship of adopted child – Whether adoption of child, whether born legitimate or illegitimate, operates retrospectively to acquire*
C *citizenship by operation of law under art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of FC – Births and Deaths Registration Act 1957, s. 13*

This originating summons was filed by the plaintiffs seeking a declaration that the second plaintiff was a Malaysian citizen in accordance with art. 15A of the Federal Constitution ('FC') and various other reliefs. The first plaintiff
D was a Malaysian citizen and was married to one Mark Lewis Arputham, a Malaysian citizen. The second plaintiff was born on 2 June 2013 and was registered under s. 12 of the Births and Deaths Registration Act 1957 at the National Registration Department on the same day. A birth certificate was issued to him, in which the information of his father was stated to be
E unknown and his biological mother was Yuliana, an Indonesian citizen. The second plaintiff was adopted by the first plaintiff who then made an application for adoption. The second plaintiff was legally adopted by the first plaintiff pursuant to an adoption order given by the Sessions Court. Subsequently, the first defendant issued a new birth certificate dated
F 18 August 2015 under the name of AHP to the second plaintiff. The citizenship status of the second plaintiff on the post adoption birth certificate was stated to be 'Bukan Warganegara' or non-citizen. On 27 June 2015, an application was made to register the second plaintiff as a citizen of Malaysia. The plaintiff has yet to receive any response on the said application. The various reliefs sought by the plaintiffs and the facts of the present matter
G raised two main issues before this court, namely (i) whether a child who is legally adopted and where the adopters are named in the post-adoption birth certificate as the parents, qualifies the child for citizenship by way of operation of law pursuant to the adoption order read with ss. 9 and 25A of the Adoption Act 1952 ('AA') and art. 14(1)(b) and s. 1(a) Part II, Second
H Schedule of the FC; and (ii) whether an illegitimate child born to a non-citizen mother of known citizenship is a stateless person for the purpose of acquiring citizenship under art. 14(1)(b) read together with s. 1(e) Part II, Second Schedule of the FC.

Held (dismissing originating summons):

I **(1)** Based on the provisions of art. 14(1)(b) of the FC read together with Part II of the Second Schedule of the FC, there are two requirements to be fulfilled to qualify a person as a citizen of Malaysia by operation of

law: (i) a person was born within the Federation; and (ii) his or her parents, one at least is at the time of the birth either a citizen or permanently resident in the Federation. The reading of both provisions indicates clearly that the origin of the paternal and maternal side of the child must be ascertained and the existence of marriage/registration of marriage of the parents must be proven besides the place of birth for the said child to qualify for citizenship by operation of law under art. 14(1)(b) of the FC. (paras 12 & 13)

(2) Section 13 of the Births and Deaths Registration Act 1957 can be understood to mean that a lawful parent refers to the biological father and mother in a valid marriage. Citizenship conferred by law under art. 14(1)(b) of the FC is when the father of the child is a citizen and legally married to the mother before the child was born. To qualify for citizenship by operation of law under art. 14(1)(b) of the FC, the second plaintiff must be born to a lawful parent. Adoptive parents were never intended to be included in art. 14(1)(b) of the FC by Parliament. Section 18 in Part III, Second Schedule of the FC is in fact the provision for adoptive children under the law where the definition of father in art. 15(3) of the FC can be referred to the adopter. Section 9 of the AA provides for the rights of the adoptive parents over the adoptive child. However, there is no specific provision under the AA on the effect of the adoption order relating to citizenship of an adoptive child. (paras 19-22)

(3) Adoption of a child, whether born legitimate or illegitimate, does not operate retrospectively to acquire citizenship by operation of law under art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of the FC. The sole determinant to acquire citizenship by operation of law is the citizenship of either the biological parents obtained at the time of the child's birth. Adoption, and for that matter, citizenship of the adoptive parents, is immaterial and irrelevant for the purpose of art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of the FC. The second plaintiff not only must be born in Malaysia but one of his biological parents must, at the time of his birth, be either a Malaysian citizen or a person who was permanently resident in Malaysia. The adoption order legally granted by a court of law on the second plaintiff could not be taken as an automatic order to grant him citizenship. Therefore, the defendants' decision in not registering the second plaintiff as a Malaysian citizen was made in accordance with the law. (paras 24 & 31)

(4) Upon reading art. 14(1)(b) read together with s. 1(e) Part II, Second Schedule FC, the plaintiff could not be said to be born stateless. Being an illegitimate child at the time of his birth and the fact that his biological mother was Indonesian, the second plaintiff assumed the citizenship of his biological mother which was Indonesia. The crucial

point to determine if the second plaintiff was 'not born a citizen of any country' was 'at the time of his birth.' For purposes of s. 1(e) of Part II of the Second Schedule, it was the potentiality of identifying or attributing a citizenship, other than Malaysia, at the time of birth that determined if a child 'is not born a citizen of any country.' (para 36)

(5) The second plaintiff was an illegitimate person at the time of birth. Therefore, his lineage could only be traceable to the biological mother, Yuliana, who was an Indonesian citizen. He could not be said as one 'who is not born a citizen of any country' because at the time of his birth, based on his lineage, he acquired the citizenship of his biological mother, Yuliana, an Indonesian citizen. A mere averment that the second plaintiff was not a citizen of any other country did not qualify him to be made a Malaysian citizen. The plaintiff was not a Malaysian citizen by operation of law under art. 14(1)(b) read together with s. 1(e), Part II, Second Schedule of the FC and s. 17, Part III Second Schedule of the FC. (paras 39 & 44)

(6) The plaintiff had availed himself the remedy in art. 15A of the FC by applying to the Minister. His application was processed by the first defendant and forwarded for the consideration and decision by the Minister. Article 15A of the FC empowers the Federal Government to register a person under the age of 21 years as a citizen in special circumstances as the Federal Government thinks fit. The power to register a person as a Malaysian citizen under art. 15A of the FC is entrusted solely to the Federal Government. If a declaration of citizenship is granted under art. 15A by this court, it would be stepping into the shoes of the Federal Government and would be tantamount to usurpation of the constitutional power entrusted to the Federal Government by our supreme law of the land. The intention of the framers of the FC that the decision to grant or not to grant citizenship under art. 15A of the FC should be left to the Federal Government is clearly embodied in s. 2, Part III Second Schedule of the FC. (para 45)

Case(s) referred to:

Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2016] 1 CLJ 736 HC ***(refd)***

Cho Chiang Huat & Anor v. Pendaftar Besar Kelahiran Dan Kematian Malaysia (Rayuan Sivil No. W-01(A)-390-08-2019) (Unreported) ***(refd)***

CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2020] 4 CLJ 597 CA ***(foll)***

CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 6 CLJ 471 FC ***(refd)***

Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 412 CA ***(refd)***

Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors [2018] 4 CLJ 758 CA ***(not foll)***
Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor [2017] 7 CLJ 33 CA ***(refd)***
Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 8 CLJ 16 CA ***(refd)***

Legislation referred to:
Adoption Act 1952, ss. 9(1), 25A(6)
Births and Deaths Registration Act 1957, ss. 7(1), (2), 12, 13
Federal Constitution, arts. 14(1)(b), 15(3), 15A, 17, Second Schedule, Part II, ss. 1(a), (b), (c), (d), (e), 2(3), Part III, ss. 2, 17, 18
Legitimacy Act 1961, ss. 3, 4

For the plaintiffs - Larissa Ann Louis; M/s Azri, Lee Swee Seng & Co
For the defendants - Nik Isfahanie W Ab Rahman; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Noorin Badaruddin J:

[1] This originating summons is filed by the plaintiffs seeking a declaration that the second plaintiff is a Malaysian citizen in accordance with art. 15A of the Federal Constitution ("FC") and various other reliefs.

Background Facts

[2] The first plaintiff is a Malaysian citizen and was married to Mark Lewis Arputham, a Malaysian citizen on 8 January 2011.

[3] The second plaintiff was born on 2 June 2013 at a private clinic in Cheras. He was registered under s. 12 of the Births and Deaths Registration Act 1957 at the National Registration Department on the same day. A birth certificate with registration number 0419981XA was issued to him, in which, the information of his father is stated to be unknown and his biological mother is Yuliana, an Indonesian citizen.

[4] The second plaintiff was adopted by the first plaintiff who then made an application for adoption and the second plaintiff was legally adopted by the first plaintiff pursuant to an adoption order given by the Sessions Court on 8 August 2014.

[5] Subsequently, the first defendant issued a new birth certificate dated 18 August 2015 under the name of AHP to the second plaintiff. The citizenship status of the second plaintiff on the post-adoption birth certificate is stated to be, 'Bukan Warganegara' or non-citizen.

[6] On 27 June 2015, an application was made to register the second plaintiff as a citizen of Malaysia. The plaintiffs have yet to receive any response on the said application.

A **Issues**

[7] The various reliefs sought by the plaintiffs and the facts of the present matter raise two main issues before this court and they are as follows:

(i) whether a child who is legally adopted and where the adopters are
B named in the post-adoption birth certificate as the parents, qualifies the child for citizenship by way of operation of law pursuant to the adoption order read with ss. 9 and 25A of the Adoption Act 1952 ("AA") and art. 14(1)(b) and ss. 1(a) Part II, Second Schedule of the FC; and

(ii) whether an illegitimate child born to a non-citizen mother of known
C citizenship is a stateless person for the purpose of acquiring citizenship under art. 14(1)(b) read together with s. 1(e) Part II, Second Schedule of the FC.

Findings

D **[8]** Article 14 in Part III of the FC is the constitutional provision relating to acquisition of citizenship by operation of law. It provides:

> Citizenship by operation of law
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
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> E
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule
>
> F

[9] Citizenship by operation of law of persons born on or after Malaysia Day is specified in Part II Second Schedule of the FC which are as follows:

> PART II [Article 14(1)(b)]
>
> CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY
>
> G
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> (a) every person born within the Federation of whose parents one at
> H least is at time of the birth either a citizen or permanently resident in the Federation; and
>
> (b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a
> I State; and

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang diPertuan Agong, registered with the Federal Government; and

(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

2. (1) A person is not a citizen by virtue of paragraph (a), (d) or (e) of section 1 if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy.

(2) In section 1 the reference in paragraph (b) to a person having been born in the Federation includes his having been born before Malaysia Day in the territories comprised in the States of Sabah and Sarawak.

(3) For the purposes of paragraph (e) of section 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to paragraph (c) of that section or otherwise.

First Issue

[10] It is the plaintiffs' submission that a child born in Malaysia who has been lawfully adopted by parents who are Malaysian citizens is a citizen by operation of law under art. 14(1)(b) and s. 1(a) of the Second Schedule FC. According to the plaintiffs, pursuant to s. 25A(6) of the AA, the post adoption birth certificate which registers the adoptive parents' names as the child's parents is conclusive evidence and proof of the identity of the child's parents "for all purposes". The plaintiffs submit that the words "parents" appearing in s. 1(a) of the Second Schedule of the FC is to be read liberally to include adoptive parents since s. 9(1) of the AA states that all rights, duties, obligation of the parent, guardian of the adopted child shall vest in and exercisable by and enforceable against the adopter "... as though the adopted child was a child born in lawful wedlock."

[11] Section 25A and s. 9(1) of the AA are reproduced:

Certificate of Birth

25A. (1) In respect of the Certificate of Birth referred to in paragraph 25(2)(b), every adoption order shall contain a direction:

(a) to the Registrar General that the word "adopted", "adopter" or "adoptive" or any word to like effect shall not appear in the Certificate; and

(b) to the natural or adoptive parent or parents, as the case may be, to surrender to the Registrar General the Certificate of Birth of the child issued under the Births and Deaths Registration Act 1957.

(2) Upon receipt of an adoption order, the Registrar General shall, subject to due compliance with paragraph (1)(b) and the payment by the adopter of the prescribed fee, issue a Certificate of Birth in respect of the child in the form set out in the Second Schedule.

(3) Where a certified copy of an entry in the Adopted Children Register had been issued in respect of a child adopted under this Act, the Registrar General shall issue a Certificate of Birth in respect of the child:

(a) upon application being made by the adoptive parent or either of the adoptive parents, or in the event of the adoptive parent or both adoptive parents being dead, by the adopted child, for a Certificate of Birth; and

(b) upon payment of the prescribed fee.

(4) Upon receipt of the Certificate of Birth under subsection (3), the adoptive parent or either of the adoptive parents, or in the event of the adoptive parent or both adoptive parents being dead, the adopted child, shall cause the certified copy of an entry in the Adopted Children Register issued in respect of the adopted child to be surrendered to the Registrar General for cancellation.

(5) The Certificate of Birth issued under this Act pursuant to an adoption order shall replace the Certificate of Birth of the child issued under the Births and Deaths Registration Act 1957, and shall for all purposes be known as the Certificate of Birth of the child.

(6) Notwithstanding anything to the contrary in any written law, the Certificate of Birth under this Act, if given under the hand of the Registrar General or any person authorized by him, shall be received without further or other proof as evidence of the facts and particulars relating to the birth of the child in respect of whom the Certificate of Birth was issued.

(7) If the Certificate of Birth issued under this Act is lost, damaged or defaced, the adoptive parent, or in the case of the adoptive parent being dead, the adopted child, may apply to the Registrar General or any person authorized by him for a copy of the Certificate of Birth which, when issued, shall be marked with the word "Replacement".

(8) The Registrar General shall establish and maintain a register to be called the Register of Birth Certificates in which shall be made such entries pertaining to the issuance of a Certificate of Birth under this Act in respect of an adopted child.

(9) Any person may apply in the prescribed form to have a search made of the Register of Birth Certificates upon payment of the prescribed fee and to have the result of the search certified in the prescribed form.

Effect of adoption order

9.(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock:

Provided that, in any case where two spouses are the adopters, such spouses shall in respect of the matters provided in this subsection and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively to a lawful father and mother, respectively.

[12] Based on the provisions of art. 14(1)(b) of the FC read together with Part II of the Second Schedule of the FC, there are two requirements to be fulfilled to qualify a person as citizen of Malaysia by operation of law:

(i) a person was born within the Federation; and

(ii) his or her parents, one at least is at the time of the birth either a citizen or permanently resident in the Federation.

[13] The reading of both provisions indicates clearly that the origin of the paternal and maternal side of the child must be ascertained and the existence of marriage/registration of marriage of the parents must be proven besides the place of birth for the said child to qualify for citizenship by operation of law under art. 14(1)(b) of the FC.

[14] The plaintiff is relying on the post adoption birth certificate which register the adoptive parents' names as the child's parents as conclusive evidence and proof of the identity of the child's parents "for all purposes" pursuant to s. 25A(6) of the AA.

[15] Firstly, the Births and Deaths Registration Act 1957 ("BDRA") is pertinent to be noted. The purpose of the birth certificate is to indicate the time, place and the biological parents of the child. Every birth of a child will be registered and a birth certificate will be issued regardless of whether the said child is a citizen or not.

[16] Sub-sections 7(1) and (2) of the BDRA provides for the registration of birth of a child. It reads:

> 7(1) Subject to the provisions of this Part, the birth of every child born in Malaysia shall be registered by the Registrar for the registration area in which the child was born by entering in a register in duplicate in manner prescribed such particulars concerning the birth as may be prescribed, and different registers shall be used and different particulars may be prescribed for live births and stillbirths respectively:
>
> Provided that, where a living is found exposed and no information as to the place of birth is available, the birth shall be registered by the Registrar for the registration area in which the child is found.
>
> (2) The following persons shall be qualified to give information concerning a birth, that is to say:
>
> (a) the father of the child;
>
> (b) the mother of the child;
>
> (c) the occupier of the house in which the child was to the knowledge of that occupier born;
>
> (d) any person present at the birth;
>
> (e) any person having charge of the child.

[17] Secondly, although it is undisputed that the second plaintiff was born in Malaysia, this fact alone does not by itself fulfil the requirement for citizenship by operation of law because his biological mother is an Indonesian and the origin of his father is unknown.

[18] It is also pertinent to take note of s. 13 BDRA. It reads:

> Notwithstanding anything in the foregoing provisions of this Act, in the case of illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[19] Section 13 of the BDRA can be understood to mean that a lawful parent refers to the biological father and mother in a valid marriage.

[20] Reading the provisions in the above, it is clear that citizenship conferred by law under art. 14(1)(b) of the FC is when the father of the child is a citizen and legally married to the mother before the child was born. To qualify for citizenship by operation of law under art. 14(1)(b) of the FC the second plaintiff therefore must be born to a lawful parent at the time of his birth.

[21] It is clear that adoptive parents ware never intended to be included in art. 14(1)(b) of the FC by the Parliament. Section 18 in Part III, Second Schedule FC is in fact the provision for adoptive children under the law where the definition of father in art. 15(3) of the FC can be referred to the adopter. Section 18 Part III, Second Schedule of the FC states:

> 18. In relation to an adopted child whose adoption has been registered under any written law in force in the Federation, including any such law in force before Merdeka Day, Clause (3) of art. 15 shall have effect as if for the reference to his father there were substituted a reference to the adopter, and references in that Clause and section 9 of this Part of this Schedule to his parent shall be construed accordingly.

[22] Section 9 of the AA provides for the rights of the adoptive parents over the adoptive child. It covers the effect of the adoptive order as well on inheritance, disposition of moveable and immovable properties. However, there is no specific provision under the AA on the effect of the adoption order relating to citizenship of an adoptive child. This had been observed by the High Court in the case of *Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2016] 1 CLJ 736 (the decision of this case was upheld by the Court of Appeal) where Collin Lawrence Sequerah JC (as His Lordship then was) had commented on the application of the AA and in particular s. 9 and s. 25 of the said Act as follows:

> [154] While the Singapore legislation made it abundantly clear that an adoption would not affect the citizenship of the adoptive child, *the position of legislation in Malaysia is silent on this aspect. It is trite that Parliament does not legislate in vain. It is equally clear that if our Legislature had intended to make provision for citizenship by operation of law upon granting of an adoption order, such intent would have been expressly provided for. It is not the province of this court to read into the articles of the Constitution provisions that are not there.*
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> (emphasis added)

[23] In *Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor* [2017] 7 CLJ 33; [2017] 3 MLJ 308, the Court of Appeal had held that the AA is not a competent legal instrument to confer citizenship status to an adopted child by operation of law under art. 14(1)(b) read together with s. 1 Part II, Second Schedule of the FC. The Court of Appeal held that the AA being a subsidiary legislation *qua* the FC, could not be interpreted in such a way as to augment what appeared to be a perceived *lacuna* in the FC. Abang Iskandar JCA (as His Lordship then was) in delivering the judgment of the court elaborated as follows:

> [21] We must state here that the law on citizenship is contained, both procedurally and substantively in the Federal Constitution itself. There is no statute that was specially legislated to house the specific provision pertaining to citizenship. Rather; these provisions reside in the Federal

Constitution. We noted too, that these provisions make no reference to other specific statutes, especially in aid of its interpretation. In fact, *the Federal Constitution itself provides for the interpretation required in order to make clear what the words in the citizenship provisions are supposed to mean. In other words, the citizenship provisions in the Federal Constitution are exclusively housed in the Federal Constitution itself*. The Federal Constitution, like most other written Constitutions, is interpreted not in the like manner in which other statutes are normally interpreted. *In relation to the Federal Constitution, all other statutes are subsidiary legislations. Thus the constitutionality of the Federal Constitution is considered from the perspective of the Constitution itself. It is not to be interpreted by reference to other statutes, albeit they were passed by Parliament*.

[22] *In the context of this case, we are of the view, with respect, that if the word 'parent' as appears in art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution was intended to include an adoptive parent in the Adoption Act 1952, as opposed to a biological parent, such intention would have been expressly provided for in the provisions on interpretations in the Federal Constitution itself. Any submission to the effect that the Adoption Act 1952 provides a perceived missing link in the meaning of parents in art .14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution, to our respectful view, is seriously flawed*.

[31] What had become clear to us had been that one of the key ingredients stipulated in art. 14(1)(b) read together with s. 1(a) of Part II of the Second Schedule of the Federal Constitution, is that *the person seeking to be a citizen of Malaysia via this specific constitutional provision must show proof that when he was born in this country, one of his parents must either be a citizen of Malaysia or was permanently resident in this country*. The phrase that is employed under that provision reads, '*is at the time of the birth*'. To our minds, *that phrase has categorically made a reference to the biological parent of the person, who must either be a Malaysian citizen or a person who is permanently resident in Malaysia*. By virtue of this phrase, *any person intending to claim citizenship by operation of law under the above stated constitutional provision, it is not sufficient that he or she was born in Malaysia. He must be a person, whose either parent was a Malaysian citizen or a Malaysian permanent resident, when he was born in Malaysia. That provision does not contain any reference to an adoptive parent, albeit a Malaysian adoptive parent*.

[33] From a reading of s. 9 of the Adoption Act 1952, we agree that the section does confer certain rights to and impose certain duties on the adoptive parents. However, those rights that have been conferred on the adopted child are specifically spelt out. The conferred rights extend even to inheritance rights of the adopted child in the sense that the adopted child stands in the same position of his other adoptive siblings, as though the adopted child was a child born out of lawful wedlock of the adoptive parents. *It would be erroneous to say that as the adopted child is deemed to be a child out of lawful wedlock, therefore his adoptive parents are thus his biological parents*. And proceeding from there, since they were Malaysian citizens, it must necessarily follow that the adopted child must be a Malaysian citizen, by operation of law, to wit art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of the Federal Constitution. We said that it was

erroneous and untenable, for two reasons. First, by deeming the child to be a child born out of lawful wedlock would confer on him the status of a legitimate child. But that same deeming provision on being born out of lawful wedlock, does not, with respect, confer on the adoptive parents the status of being the biological parents of the adopted child. Secondly, s. 9(1), with respect, confers rights stated thereunder, prospectively. *The rights conferred on the adoptive parents operate only upon the granting of the adoption order. It does not operate retrospectively so as to obliterate what had been done in relation to the child before his adoption*. The adoptive parents only come into the shoes of the biological parents upon the issuance of the adoption order, at which time, the rights of that the biological parent's rights, in *futuro*, over the child are, in law, extinguished. *The presumed legitimacy must be understood in the context of what was intended in the scheme of things as contained in s 9(1) of the Adoption Act 1952 which is, among others, to render the adopted child to be on equal footing with his other adoptive siblings, if any. In light of that, the adoptive parents can never fulfil the critical ingredient in the Federal Constitution that requires the person to prove that his 'parents one at least is at the time of the birth either a citizen or permanently resident in the Federation namely that of a biological parents. That is because it is a factual impossibility, as any adoption comes only after the birth, not at the time of the birth*.

[34] We also note that these rights are 'deemed' rights conferred by the said Act.

[36] To our minds, with respect, the omission to refer to citizenship under s. 9 of the Adoption Act 1952 was a deliberate one. The provisions on citizenship reside under the Federal Constitution and they represent the accepted regime on citizenship and how it is and/or could be obtained. A reading of the art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of Federal Constitution has yielded the following observations. *We are of the view that the phrase 'is at the time of birth' refers to an actual factual event, referring therefore to the actual biological parent, as opposed to a 'deemed' biological parent created solely for the purpose of catering to the needs of the adopted child within the context of the Adoption Act 1952*. We say so because, *if the Federal Constitution had intended that an adopted child to a non-Malaysian citizen or a permanent resident of Malaysia, be conferred as a Malaysian citizen upon successful adoption, such provision would have been expressly stipulated in the Federal Constitution itself. The Adoption Act 1952, being a subsidiary legislation qua the Federal Constitution, cannot be interpreted in such a way as to augment what appears to be a perceived lacuna in the Federal Constitution*. 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it' per Raja Azlan Shah FJ (as His Highness then was) in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187.

[38] *So the Adoption Act 1952, could not even pretend to confer citizenship to an adopted child upon successful issue of the adoption order from which the current birth certificate of the child was issued by the appellant*.

[39] Put simply, *the Adoption Act 1952 is not competent as a legal instrument to confer citizenship status to an adopted child under art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of Federal Constitution. The fact that it is silent on that*

subject must be telling. Indeed, it would be futile to insert such a provision in the Adoption Act 1952. *If it was the intention of the Federal Constitution to include an adoptive parent as a biological parent (parent whose at least one is at the time of the birth) for the purpose of art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of Federal Constitution such intention would have found clear expression in the Federal Constitution itself, because to interpret an adoptive parent in the definition of a biological parent would have huge implications*. To reiterate, we could not find such express stipulation in the Federal Constitution and neither could learned SFC nor Mr Raymond Mah, to that effect. In the circumstances, *it would indeed be wrong for us to read into the Federal Constitution something which is conspicuously not there*. We are therefore in agreement with the learned SFC on this score.

[40] Two of the panel members of this court which had heard and dismissed the appeal by the appellant in the CKN case, namely my learned brother, Dato Zamani A Rahim and my learned sister, Puan Sri Zaleha Yusof, are of the view that nothing which they had heard in the oral, as well as in the written submissions by Mr Raymond Mah before us, had persuaded them to depart from their decision in the CKN appeal case. Having had the advantage of perusing the judgment of the learned JC in the CKN case which had been affirmed by this court on appeal, I, too have no reason to disagree with them. We can find no cogent reasons as to why we ought to depart from it. *We are unanimous in our view that an adoption order issued under the Adoption Act 1952 does not confer Malaysian citizenship to an adopted child although one of his adoptive parents is a Malaysian citizen ora person permanently resident in Malaysia by operation of law, within the contemplation and ambit of art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of the Federal Constitution. To be a Malaysian citizen by operation of law under the provisions of art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of the Federal Constitution, the person must be born in Malaysia and one of his biological parents is at the time of his birth, either a Malaysian citizen or a person who is permanently resident in Malaysia, in this appeal before us, the applicants did not fulfil the crucial biological, or the jus sanguinis, criterion as envisaged under the said article*.

(emphasis added)

[24] The Court of Appeal judgments in *Pang Wee See* (*supra*) and the High Court in *Chin Kooi Nah* (*supra*) had clarified that adoption of a child, whether born legitimate or illegitimate, does not operate retrospectively to acquire citizenship by operation of law under art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of the FC. It is clear that the sole determinant to acquire citizenship by operation of law is the citizenship of either the biological parents obtained at the time of the child's birth. Adoption, and for that matter, citizenship of the adoptive parents, is immaterial and irrelevant for the purpose of art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule of the FC. The second plaintiff not only must be born in Malaysia but one of his biological parents must at the time of his birth be either a Malaysian citizen or a person who is permanently resident in Malaysia.

[25] Learned counsel for the plaintiffs had referred to the Court of Appeal decision in *Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors* [2018] 4 CLJ 758 ("*Madhuvita* case") where the Court of Appeal stated that art. 14(1)(b) Part II, Second Schedule FC does not make reference to the nature or state the capacity of parents. In other words, the Court of Appeal found that the term "parents" is not qualified by the word lawful, natural, biological, adopted or even surrogate or any other description or adjective. The court was of the view that it simply refers to the capacity of "parents". It is argued that as such the second plaintiff has satisfied the second condition *ie*, his (adoptive) parents one at least is at the time of the birth either a citizen or permanently resident in the Federation.

[26] *Madhuvita Janjara Augustin* (*supra*) is a case where the appellant was born in Malaysia. Her mother was the citizen of Papua New Guinea while her father (the first respondent) was a Malaysian citizen. The appellant's parents were not married to each other at the time of her birth. They got married after the appellant was born. The appellant's parents were not aware that the appellant's birth was not registered until they wanted to enrol the appellant at a local school. A birth certificate was required for that purpose. The appellant's birth was then registered on 18 April 2011. According to the details entered in the birth certificate issued by the third respondent, the appellant was not a Malaysian citizen. The first respondent applied for citizenship under art. 15A of the FC but the application was unsuccessful.

[27] Essentially, the Court of Appeal in *Madhuvita Janjara Augustin* (*supra*) had held that:

(i) section 17 of Part III of the Second Schedule does not apply to art. 14(1)(b) read together with s. 1(a) Part II of the Second Schedule. Article 14(1)(b) read together with s. 1(a) Part II of the Second Schedule does not make reference to the nature or state of the parents' capacity and hence it is inappropriate for the court to qualify the term "parents" to mean "lawful parents";

(ii) alternatively, art. 14(1)(b) read together with s. 1(a) Part II of the Second Schedule FC refers only to the biological parents of a child (reference was made to the case of *Pang Wee See* (*supra*)), hence the condition was met since one of the biological parents is a Malaysian citizen and/or permanent resident. The fact that the biological parents were not married to each other at the time of the child's birth does not alter their capacities as parents of the child;

(iii) for s. 17 to apply, the child's legitimacy or illegitimacy is questioned at the time of the consideration of the application for citizenship and not some other point in time;

(iv) since the child has been legitimated by the subsequent marriage of his parents, s. 17 does not apply. As a legitimated person, the child has fulfilled the requirements of art. 14(1)(b) read together with s. 1(a) Part II of the Second Schedule.

[28] However, the Court of Appeal in another case, *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2020] 4 CLJ 597; [2020] 3 MLJ 634, ("*Bermillo* case") took an opposite view on this very same issue. In *Bermillo*, the child was also born out of wedlock. He was illegitimate at the time of his birth. The Court of Appeal had put emphasised on acquisition of citizenship by operation of law under art. 14(1) is "at the time of the child's birth". The Court of Appeal was of the view that a legitimated child is only deemed legitimate on the date of the subsequent marriage of his parents and not from the date of his birth. The court further held that legitimacy of the child under ss. 3 and 4 of the Legitimacy Act 1961 ('the LA 1961) could not be retrospective as s. 4 of the same clearly stated that the child was rendered legitimate 'from the prescribed date or from the date of the marriage, whichever is the later'. It means the child was only deemed legitimate on the date of the marriage of his parents and not from the date of his birth. Pertinently, the Court of Appeal observed that the LA 1961 does not provide for right to citizenship to a legitimated child and is not a competent legal instrument to confer citizenship under the FC.

[29] This court is of the considered view that the decision in *Bermillo* case is the preferred view herein because firstly, *Madhuvita Janjara Augustin* is not factually concerned with the AA/adoption order. Secondly, in the latest case of *Cho Chiang Huat & Anor v. Pendaftar Besar Kelahiran Dan Kematian Malaysia* (Rayuan Sivil No. W-01(A)-390-08-2019), the Court of Appeal in dealing with the issue directly on point with the present matter had affirmed the decision of Nordin Hassan J (as His Lordship then was) in the High Court where the learned judge had held *inter alia* that the words "at the time of birth" in s. 1(a) Part II Second Schedule FC refer to the status of the biological parents and not the adoptive parents who adopted the child under the AA and the adoption order does not confer any citizenship status to the adopted child.

[30] It had been decided that in the case of illegitimate persons, references to a person's father, parent, or one of his parents is to be construed as references to his mother (s. 17). In *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 6 CLJ 471; [2021] 4 MLJ 236 ("*CTEB*"), the child was born in Philippines. The said child's biological father is a Malaysian citizen born in Kedah and the child's biological mother is a Filipino citizen. The said child had a Filipino passport. The biological parents of the said child legally registered their marriage in Malaysia five months after the child's birth and the family is domiciled in Malaysia. The Federal Court (by majority) had held that:

> [157] From the express distinction for parents or father of an illegitimate child in s. 17, it is obvious that the word 'parents' in the context of Part III of the FC must be construed to refer to lawful parents in a recognised marriage in the Federation. This country never legally recognised unwedded parents. I say so because proper distinctions have always been made in our legislation in order to differentiate between the status of 'parents' in a recognised marriage or otherwise. Even under s. 13 of the Births and Deaths Registration Act 1957, the legislation makes a clear distinction between a father or mother of an illegitimate child. This connotes that 'parents' refers always to legally wedded parents, not biological father and mother.

[31] Guided by the authorities cited in the above and the significant placed on the status obtained at birth of a child as envisaged by art. 14(1)(b) read together with s. 1(a) Part II, Second Schedule FC, the adoption order legally granted by a court of law on the second plaintiff cannot be taken as an automatic order to grant him citizenship. Therefore, the defendants' decision in not registering the second plaintiff as a Malaysian citizen is made in accordance with the law.

Second Issue

[32] It is further submitted that the second plaintiff can be treated as a citizen by virtue of art. 14(1)(b) read together with s. 1(e) Part II, Second Schedule of the FC. The plaintiffs take the position that a child born in Malaysia who remains stateless for a year after his/her birth is a Malaysian citizen by virtue of this provision.

[33] In *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 412; [2018] 6 MLJ 548 ("*Lim Jen Hsian*") the Court of Appeal had answered the second issue herein. In *Lim Jen Hsian*, the child biological mother ("Rai Putta") was a citizen of Thailand. The first appellant claimed to be the biological father of the child. The first appellant and Rai Putta were never married and/or had not registered their marriage at the first respondent's office. The first appellant claimed that the first appellant and Rai Putta were separated in April 2011 when Rai Putta returned to Thailand for good. Since then, the child had been under the care of the first appellant's mother. On 9 April 2011, the first appellant had, for the first time, applied for the child's citizenship under art. 15A of the FC. The application was dismissed by the Secretary General. The first appellant obtained leave to apply for judicial review against the Secretary General's decision. However, the judicial review application was dismissed by the High Court.

[34] The Court of Appeal in *Lim Jen Hsian* had held *inter alia* as follows:

> [36] Paragraph 1(e) of Part II, Second Schedule of the Federal Constitution confers citizenship to a person born by *jus sanguinis*, by reference to his blood or lineage. Thus when a child has not, at birth, acquired citizenship of any country, this would render him/her not born a citizen of any country.

[37] In the instant case, although the second appellant was born in the Federation, he does not acquire citizenship from his Malaysian biological father as being iliegitimate, he acquires the citizenship of his biological mother who is a Thai national. The second appellant's biological mother named Rai-Putta Thippawan ('Rai Putta') is a citizen of Thailand (exh A of end 10) (refer to *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573).

[38] The second appellant's lineage would only be traceable to his Malaysian biological father provided that his parents was in a lawful marriage. In the case of an illegitimate child, the word 'parent' is construed to refer to his biological mother.

Section 17 of Part III of the Federal Constitution states as follows:

> For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such person.

[39] In the instant case the identity and citizenship status of the second appellant's biological parents are known. There is no dispute that the second appellant's biological father is the first appellant and his biological mother, Rai-Putta is a Thai National. There is also no dispute that at the time of his birth, the second appellant's biological parents were not legally married.

[40] While the second appellant's biological father is a – Malaysian citizen, because of the second appellant's illegitimate status, the second appellant does not acquire the citizenship of his biological father. Instead, he acquires the citizenship of his biological mother who, it is not disputed, is a Thai national. Thus, he cannot be said to be one, who is not born a citizen of any country pursuant to para 1(e) of Part II, Second Schedule of the Federal Constitution.

[41] Thus, on the available evidence the appellants have failed to prove a *prima facie* case that the second appellant was not born a citizen of any country. In the circumstances, we are of the opinion that the burden of proof has not shifted to the respondents to prove that the second appellant was conversely, born a citizen of another country (*ie*, Thailand). Thus, the issue of whether expert opinion is required by the respondent to prove that the second appellant had acquired Thai citizenship at birth does not arise.

[42] In conclusion, we are of the considered opinion that the second appellant has failed to satisfy the requirements stipulated in para 1(e) of Part II, Second Schedule of the Federal Constitution, to obtain citizenship by operation of law.

[35] The same panel of judges of the Court of Appeal in *Lim Jen Hsian* had earlier echoed the same stand in the case of *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 662 wherein it was held that s. 1(e) Part II, Second Schedule of the FC 'refers to the relationship of the (child) to his biological and lawful parents at the time of his birth'. It would therefore follow that the status of the child's biological parents at the time of his birth will in turn decide if the child 'was not born a citizen of any country' as stipulated in s. 1(e) Part II, Second Schedule FC.

[36] Upon reading art. 14(1)(b) together with s. 1(e) Part II, Second Schedule FC, it is of the considered view that the second plaintiff cannot be said to be born stateless. Being an illegitimate child at the time of his birth and the fact that his biological mother is Indonesian, the second plaintiff assumed the citizenship of his biological mother which is Indonesia. It must be borne in mind that the crucial point to determine if the second plaintiff is 'not born a citizen of any country' is 'at the time of his birth'. It is of the considered view that for purposes of s. 1(e) of Part II of the Second Schedule it is the potentiality of identifying or attributing a citizenship, other than Malaysia, at the time of birth that determines if a child 'is not born a citizen of any country'.

[37] A person not born as a citizen in any country encapsulates the requirement of *jus sanguinis*, a blood relation, a relationship to his biological parents at the time of his birth. The following cases had decided as such:

(i) *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16; [2017] 5 MLJ 662;

(ii) *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 412; [2018] 6 MLJ 548.

[38] Further, if a person is born out of wedlock, he is an illegitimate person at the time of birth and his lineage could only be traceable to his biological mother and could not be traceable to his biological father. This is based on s. 17, Part III, Second Schedule of the FC and the Court of Appeal's decision in *Lim Jen Hsian*.

[39] The second plaintiff is an illegitimate person at the time of birth. Therefore, his lineage could only be traceable to her biological mother, Yuliana who is an Indonesian citizen. He cannot be said as one who is not born a citizen of any country because at the time of his birth, based on his lineage, he acquires the citizenship of his biological mother, Yuliana, an Indonesian citizen. A mere averment that the second plaintiff is not a citizen of any other country does not qualify him to be made a Malaysian citizen.

[40] In regard to s. 2(3), Part II, Second Schedule of the FC, it is of the considered view that the provision only operates to treat any citizenship which a person acquires within one year after his birth as a citizenship that he acquires at the time of his birth. The operation of s. 2(3), Part II, Second Schedule of the FC to treat the citizenship as being acquired at the time of birth is in line with the determining point of time for acquisition of citizenship by operation of law under s. 1, Part II, Second Schedule of the FC where all the paras. (a) to (e) use the words "at the time of the birth" and "born".

[41] It can be understood that s. 1(e) Part II, Second Schedule FC is the general rule that every person born within the Federation who is not born a citizen of any country is a Malaysian citizen by operation of law. Section 2(3) Part II, Second Schedule FC is one of the exceptions to the general rule that is, a person is not entitled to Malaysian citizenship by operation of law if he acquires any citizenship within one year after his birth.

[42] In the present matter, it is of the considered view that s. 2(3), Part II, Second Schedule of the FC does not apply because there is no evidence before the court that the plaintiff has acquire any citizenship within one year after his birth for such citizenship to be treated as acquired at the time of his birth. Section 2(3), Part II, Second Schedule of the FC is therefore irrelevant to the present case. Section 2(3), Part II, Second Schedule of the FC does not provide that if a person does not acquire any citizenship within one year after his birth, he was not born a citizen of any country under s. 1(e), Part II, Second Schedule of the FC. If the framers of the FC intended for s. 2(3), Part II, Second Schedule of the FC to operate in such manner, such provision would have been expressly included. If s. 2(3), Part II, Second Schedule of the FC is interpreted to operate in such manner, it would amount to a rewriting of the provision of the FC which clearly cannot be, done.

[43] In interpreting ss. 1(e) and 2(3) Part II, Second Schedule the plaintiffs misinterpreted and had ignored the requirement of "not born a citizen of any country" in s. 1(e) which requires the evidence of lineage as established by the decided case law. The second plaintiff is an illegitimate person at the time of birth as there was no evidence and information with regards to his biological father (refer to exh. "JK-3") where the biological mother had admitted that she was not married before giving birth to the second plaintiff and that she did not know the father of her child. Therefore, the second plaintiff's lineage could only be traceable to his biological mother who is an Indonesian citizen by the name of Yuliana.

[44] This court finds that the plaintiff is not a Malaysian citizen by operation of law under art. 14(1)(b) read together with s. 1(e), Part II, Second Schedule of the FC and s. 17, Part III Second Schedule of the FC.

[45] In the final analysis, the plaintiff in the present case had availed himself the remedy in art. 15A FC by applying to the Minister on 27 August 2015. His application was processed by the first defendant and forwarded for the consideration and decision by the Minister. Article 15A FC empowers the Federal Government to register a person under the age of 21 years as a citizen in special circumstances as the Federal Government thinks fit. The power to register a person as a Malaysian citizen under art. 15A FC is entrusted solely to the Federal Government. If a declaration of citizenship is granted under art. 15A by this court, it is of the considered view that it would be stepping into the shoes of the Federal Government and would be tantamount to usurpation of the constitutional power entrusted to the Federal Government by our supreme law of the land. The intention of the framers of the FC that the decision to grant or not to grant citizenship under art. 15A FC should be left to the Federal Government is clearly embodied in s. 2, Part III Second Schedule of the FC which provides:

> A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.

Conclusion

[46] Premised on the above, this originating summons filed by the plaintiffs was dismissed with no order as to costs.